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RELEASE AND DISCHARGE OF POWERS.

THE extinction of a power is generally effected or attempted by a release of the power to a person who has an interest in the property over which the power exists; as when a life tenant having a general power of appointment by deed or will releases the power to the remainderman.

But a power may also be extinguished by the donee of the power dealing with the property over which the power exists in a way which estops him to exercise the power, as when A, having an estate in fee simple and also a power appendant, conveys the land to a purchaser. Here, although A does not purport to release the power, he can no longer exercise it; the power is extinguished.

Although the form of such an extinguishment of a power is different from that of a release, it amounts to the same thing; in substance it is a release of the power to the person to whom the land is conveyed, and hence such extinguishments and releases can be considered together.

The first distinction in powers rests on the nature of the instrument by which the power is exercisable. It may be exercisable by either deed or will, or by will alone. A power may be made exercisable by deed and not by will, but the law as to releases is the same in the case of powers of this description as it is in that of powers exercisable by either deed or will. For the essential difference is whether the power can be exercised at once, or only on the death of the donee.

Again, powers are either general or special. Under a general power an appointment can be made to any one, including the ap-

pointing donee. Under a special power an appointment can be made only to certain persons or objects, or to certain classes of persons or objects other than the donee. Special powers are sometimes called limited powers.

Finally, the relation between the donee and the property over which he has the power of appointment may be one of four kinds: *First.* The donee may have an interest in the property from which the exercise of the power will derogate, as when the donee of the power owns the property in fee. This is called a power appendant. *Second.* The donee may have an interest in the property, but the exercise of the power will not derogate from such interest, as when A has a life estate, with power to appoint by will. This is called a power in gross or collateral. *Third.* The donee has no interest in the property, but has himself created the power, as when a man conveying land in fee reserves to himself a power of appointment. This is also called a power in gross or collateral; to distinguish it from the power of the second kind, it will be called here a reserved power in gross. *Fourth.* The donee has no interest in the property and did not create the power. The power in this case is said to be simply collateral.

This somewhat clumsy nomenclature is derived from an opinion of Hale, C. B., in Edwards *v.* Sleater.[1]

These classes of cases will be considered in the following order.

I Powers Appendant
II Powers Simply Collateral
III Reserved Powers in Gross
IV Powers in Gross

and under each of these heads will come —

(*A*) *General powers exercisable by either deed or will;*
(*B*) *Special powers exercisable by either deed or will;*
(*C*) *General powers exercisable by will only;*
(*D*) *Special powers exercisable by will only.*

In all, sixteen classes of powers.

[1] Hardr. 410, 415, 416.

I.

Powers Appendant.

An estate in fee and a power appendant may subsist in the same person.

Thus, A may convey land to such uses as he shall appoint, and until appointment to himself in fee; or he may simply convey to such uses as he may appoint, in which case he will have a resulting use in fee.

Whatever doubt may have at any time existed, the strong opinion of Lord Eldon, C., in Mandrell *v.* Mandrell,[2] has settled that the fee and a power may coëxist in the same person.[3]

In Cross *v.* Hudson[4] an estate was conveyed to A for life, with remainders over, and an ultimate remainder to the survivor of himself and his wife in fee; and A had a power to appoint. His wife died in his lifetime, and all the intervening remainders became incapable of taking effect, so A was seised in fee. He appointed by will. Lord Thurlow, C., thought that the power was merged in the fee. But the true ground of the decision was not that there was a merger or extinction of the power, but that it was intended that the power should continue only during the existence of the intermediate estates and should cease when the ultimate remainder vested. It was a question of construction based on intention.[5]

If a power is appendant, a conveyance of the interest to which the power is appendant extinguishes the power. The donee of the power cannot derogate from his own grant.[6]

But if one having an estate in fee, and also a power appendant, makes a conveyance which is conditional, like a mortgage, or which passes only a partial interest, like a lease, although he cannot, by exercising the power, derogate from the title of the mort-

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[2] 10 Ves. 246, 256, 257 (1804).

[3] See Glass *v.* Richardson, 9 Hare 698, 702; Sugden, Powers, 8 ed., 93 *et seq.*; Farwell, Powers, 2 ed., 38; Leake, Land Law, 381.

[4] 3 Bro. C. C. 30.

[5] See Wolley *v.* Jenkins, 23 Beav. 53 (1856); Sugden, Powers, 8 ed., 99, 859; Leake, Land Law, 382; Gray, Rule against Perpetuities, § 497.

[6] Leake, Land Law, 383.

gagee or the lessee, he can still exercise the power, subject to that title.[7]

Sometimes a power is in part appendant, and in part in gross, as when a tenant for life has a power to lease or to sell. Here a conveyance by him of his life estate will prevent him from exercising the power as against the grantee of the life estate, but he can still exercise it against the remaindermen.[8]

Lord St. Leonards has some observations adverse to the right of a tenant for life to exercise powers of leasing or of sale and exchange after parting with his estate for life.[9] But the court, in Alexander *v.* Mills,[10] says:

"The only thing really pressed upon us against these decisions is that Lord St. Leonards, in successive editions of his work on Powers, has treated each case as limited to the circumstances of that case, and has declined to recognize them as establishing the broad principle that, as long as nothing is done in derogation of the alienee's estate, the alienation has no operation on the power. We cannot set this limitation on the part of this eminent author against the judicial decisions themselves."

A man's right over his property cannot be interfered with by giving him a power, and if he cannot dispose of his property his rights over it are interfered with. Therefore, it is immaterial whether a power appendant is to be exercised by deed or will, or by will only, or whether it is a general or a special power.[11]

In Cunninghame *v.* Thurlow [12] A had an exclusive power to appoint, by deed or will, personal property in which he had a life interest to his children. The gift in default of appointment was to the children. One of the children died, having appointed A executor, and bequeathed to him his personal property. The share of the child in the property, in default of appointment, was thus vested in A, and the power, as to this share, became appendant. A appointed four-fifths of the fund, and released his power over the part not appointed. He then applied to have his share of the non-appointed part paid over to him. Shadwell, V. C., although

[7] Alexander *v.* Mills, L. R. 6 Ch. 124; Hardaker *v.* Moorhouse, 26 Ch. D. 471; Farwell, Powers, 2 ed., 30; Leake, Land Law, 384.

[8] Jones *v.* Winwood, 4 M. & W., 653.

[9] Sugden, Powers, 8 ed., 66 *et seq.*

[10] L. R. 6 Ch. 135.

[11] Hurst *v.* Hurst, 16 Beav. 372; Piers *v.* Tuite, 1 Dr. & Walsh 279.

[12] 1 Russ. & M. 436, note (1832).

he thought the power was extinguished, declined "to give effect to the release, so far as it operated to vest a share of the fund in the father."

But in Smith *v.* Houblon,[13] where a life tenant had an exclusive power to appoint to his children, with a gift over in default of appointment to the children, one of the children died, the father mortgaged the share which he took as administrator of the child, and released his power of appointment to the mortgagees. Sir John Romilly, M. R., held that the power was released as to this share. And in *In re* Radcliffe, the Court of Appeal approved Smith *v.* Houblon, and declined to follow Cunninghame *v.* Thurlow.[14]

Does the bankruptcy of the donee extinguish a power appendant? The answer must depend largely upon the words of the particular Bankrupt Act.

As a general question, apart from special provisions, it may be said that the assignee steps into the shoes of the bankrupt, and that a conveyance by the assignee must have the same effect as a conveyance by the bankrupt; and it is held in England that an assignment in bankruptcy extinguishes a power appendant.[15]

But as an open question this may well be doubted. When a man, having the fee and a power appendant, conveys the fee, the reason why the power is extinguished is, that he is estopped to derogate from his grant; but if the transfer of the property is *in invitum*, there would seem to be no estoppel; and it has accordingly been held that if A is tenant in fee, and has also a power appendant, judgment and execution on the land will not extinguish the power.[16]

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[13] 26 Beav. 482 (1859).

[14] [1892] 1 Ch. (C. A.) 227; and see *In re* Selot's Trust, [1902] 1 Ch. 488, 493. But *cf. In re* Little, 40 Ch. D. 418.

[15] Doe *v.* Britain, 2 B. & Ald. 93; Hole *v.* Escott, 2 Keen 444; s. c. 4 Myl. & Cr. 187.

[16] Doe *v.* Jones, 10 B. & C. 459; Eaton *v.* Sanxter, 6 Sim. 517; Skeeles *v.* Shearly, 8 Sim. 153; 3 Myl. & Cr. 112; Leggett *v.* Doremus, 25 N. J. Eq. 122. See The Queen *v.* Ellis, 19 L. J. Ex. 77.

II.

Powers Simply Collateral.

Such powers, if special, cannot be released.[17] This has been held *semper, ubique et ab omnibus.*

Powers simply collateral, if general, that is, which are exercisable in favor of the donee, if exercisable by deed or will, can be released. In fact a release by the donee is equivalent to an appointment by him.

Suppose we have now a power simply collateral, which is general, but which can be exercised by will only. In this case the decision must be the same as in the case of general powers in gross. General powers in gross exercisable by deed or will can be released; if they cannot be released when testamentary, this must be solely on account of their testamentary character, and whether such testamentary character does or does not affect them is the same question in the case of powers simply collateral as arises in the case of powers in gross, and will be considered with the latter.

At the present time, in England, by statute,[18] "A person to whom any power, whether coupled with an interest or not, is given may, by deed, release or contract not to exercise the power."

III.

Reserved Powers in Gross.

We have seen that under the general head of powers in gross are classed not only powers where the donee has an interest in the land over which the power exists, but also powers where the donee has created the power upon conveyance of the fee, and propositions about the releasability of powers in gross are expressed in general terms applicable to both kinds. Almost all the instances of the release of powers in gross discussed in the books are where the donee of the power has an interest in the land, and I know no sufficient reason why the law as to the releasability

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[17] Sugden, Powers, 8 ed., 49.

[18] St. 44 & 45 Vict. (1881), c. 41, § 52.

of a reserved power in gross should differ from that of a power in gross where the donee has an interest in the land. I pass therefore to the consideration of the latter class.

IV.

Powers in Gross.

General powers in gross exercisable by either deed or will can be released. In fact a release of such a power is equivalent to an appointment.

There remain two questions:

Can special powers be released?

Can testamentary powers be released?

The case of a special testamentary power in gross presents both questions.

(A) *Can special powers in gross be released?*

A common case of a special power of appointment in gross is when a tenant for life has an exclusive power of appointment by either deed or will to his children, and the gift in default of appointment is to the children in fee. Here the tenant in life can release to the children, for such a release is, in effect, an appointment to them.[19]

The difficult case arises when those who take the property in default of appointment are different from those to whom the appointment can be made. As, for instance, when A, tenant for life, has a power to appoint to his children, but the gift in default of appointment is to B, and A releases his power to B.

As I have said, it is universally agreed that a special power simply collateral cannot be released by the donee.

Why should not the law be the same with a power in gross?

Let us take two typical cases. (1) To A for life, on his death as he shall by deed or will appoint to his children or grandchildren, and, in default of appointment to his children. Here A has a power in gross. (2) To A for life, on his death as B shall appoint by deed or

[19] This was the case in Smith *v.* Plummer, 17 L. J. Ch. 145; Walford *v.* Gray, 11 Jur. N. S. 106, 473; and Foakes *v.* Jackson, [1900] 1 Ch. 807.

will to A's children or grandchildren, and in default of appointment to the children of A. Here B has a power simply collateral. In both cases there is a life estate and a remainder. In neither case does the exercise of the power affect the life estate. In both cases its exercise derogates from the remainder in precisely the same way. The only difference is that in the first case A has, and in the second case B has not, any interest in the property over which the power exists, but as the exercise of the power cannot affect A's interest it would seem that this circumstance is immaterial, and that special powers in gross, like special powers simply collateral, should be non-releasable.

And that there is no reason for distinguishing them is indicated by the English statute above cited, which makes all powers releasable without regard to whether they are in gross or simply collateral.

But although this seems pretty obvious, the course of decision in England has not been in accordance with it, and donees of special powers, even of testamentary powers, have been allowed to release them.

How did this come about?

It arose out of the law as to tortious conveyances. Whether a special power in gross was extinguished by a tortious conveyance such as a feoffment or a fine was a matter much disputed in the profession, but that it could be so extinguished by a fine was settled by the careful *dicta* of Vice-Chancellor Leach in West *v.* Berney,[20] followed by his decision in Smith *v.* Death.[21] and his decision as Master of the Rolls in Bickley *v.* Guest.[22]

It has been suggested that a power in gross was extinguished, at common law, by a tortious conveyance, because a new estate was created by the tortious conveyance; the old estate was divested; the seisin out of which the estates of the appointees were to be fed was destroyed, and therefore the power became extinct. But an objection to this explanation is that the estates of the appointees taking under powers simply collateral must also be fed out of the original seisin, and yet such powers are not extinguished by a tortious conveyance.

The better reason seems to be that given by Vice-Chancellor

[20] 1 Russ. & M. 431 (1819).
[21] 5 Mad. 371 (1820).
[22] 1 Russ. & M. 440 (1831).

Leach in Smith *v.* Death.[23] He says that the grantee or devisee for life "could deal with the estate in respect of his freehold interest; and his dealing with the estate, so as to create estates inconsistent with the exercise of his power, must extinguish his power, upon the general principle that a person is not permitted to derogate from his own grant." That is, the tenant for life, by virtue of his freehold interest, had the legal right to create an estate in fee, which was good until and unless it was defeated by the remainderman, and this estate was inconsistent with the exercise of the power, which therefore became extinct, just as a power appendant was extinguished by a conveyance of the fee. But the donee of a power simply collateral, having no freehold interest, could not grant an estate. Therefore the donee of a power in gross could extinguish it by a fine, while the donee of a power simply collateral could not.

But in 1823 the case of Horner *v.* Swann[24] came before Sir Thomas Plumer, M. R. Here there was a devise in trust for the testator's widow for life, should she so long continue his widow, with a power of appointment by will to such or all of his children and their issue as she might choose. The gift in default of appointment was in trust for all the testator's children in fee, share and share alike, but if a child died under twenty-one, without leaving issue, then, as to the share of such child, for the survivors or survivor. The wife and children contracted to sell the land, and on a bill by them for specific performance, the purchaser submitted that a good title could not be made, by reason of the widow's power to appoint to the issue of the children. The court decreed specific performance.

The joining of the wife in the conveyance was really an appointment to the children, who were among the objects of the exclusive power; even if in form a release, it had the effect of an appointment to them of the shares given them in default of appointment.

The real objection to the decision was that, whether the widow's action was considered as an appointment or a release, it was an attempt to do *inter vivos* what could be done only by will. This objection will be considered later.

The opinion in Horner *v.* Swann is very unsatisfactory. It is

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[23] 5 Mad. 371, 374.

[24] T. & R. 430.

two and a half lines long: "the Vice-Chancellor has given a solemn opinion upon the point, and his decision has been acquiesced in. I shall therefore follow it." But the solemn opinion of the Vice-Chancellor was that a special power in gross was extinguished by a fine, not that it was extinguished by a release. And the reason for the donee's fine extinguishing a power did not apply to a release.

But Horner *v.* Swann seems to have been accepted by the English judges and text-writers as establishing a general doctrine that a special power in gross can be released by the donee.[25] But this has not been done without protest. Lord Redesdale, in the House of Lords, before the decision of West *v.* Berney, had asked "How can a man having a power for the benefit of children destroy it?" [26] Sir R. T. Kindersley, V. C., in Coffin *v.* Cooper,[27] said:

"In the absence of authority I should have decided this case with reference to certain broad principles, the soundness of which cannot (I think) be disputed. One is that a power to appoint among children is a power in the nature of a trust, created and intended to be exercised with a view to the benefit of the objects of the power as a class and as individuals. . . . Another general principle appears to me to be that where a donee of a power is shown to have exercised it with the view of benefiting some person not an object of the power, and, *a fortiori* with a view to his own benefit, even in the absence of any actual bargain, the appointment cannot be supported, as being in violation of the principle that nothing shall be regarded but the benefit of the objects of the power. These appear to me to be sound general principles, and if I were not concluded by authority, I should have decided the case in accordance with them. But these principles have been broken in upon little by little, until they seem to have been in a great degree set aside";

and the Vice-Chancellor felt himself bound to decide against his own opinion.

And in Palmer *v.* Locke [28] Sir George Jessell, M. R., says of Coffin *v.* Cooper, that it

"lays down what appears to me the true principle which should govern Courts of Equity in cases of this kind so clearly and forcibly that I

[25] Cunninghame *v.* Thurlow, 1 Russ. & M. 436, note; Sugden, Powers, 8 ed., 88 *et seq.*; Farwell, Powers, 2 ed., 15 *et seq.*

[26] Jesson *v.* Wright, 2 Bligh 1, 15 (1820).

[27] 2 Dr. & Sm. 365, 373 *et seq.* (1865).

[28] 15 Ch. D. 294 (1880).

think I should only diminish instead of adding to the weight of that judgment by any observations of my own. But in that case, even in the then state of the authorities, the Vice-Chancellor thought he was compelled to decide against his own opinion of what the true principle was,"

and the Master of the Rolls proceeded to follow the Vice-Chancellor.

So Farwell, J., in *In re* Ross said:[29]

"It has been held by a series of decisions — although originally, as Kindersley, V. C., points out in Coffin *v.* Cooper, somewhat contrary to principle — that the donee of a limited power of appointment may release it."

And, often, where courts have sustained the validity of the release of powers in gross, they have done so on the ground that the rule had been long established, and not on the ground that it embodied a sound principle.

And a case which shows the attitude of the courts towards this rule as to release of special powers in gross is *In re* Little.[30] The English Conveyancing and Law of Property Act,[31] gives the court a discretionary power to dispense with a clause restraining anticipation attached to the life estate of a married woman. A fund was settled on a married woman for life with a clause against anticipation. She had an exclusive power to appoint by deed or will to her children or their issue born in her lifetime. She agreed with one of her sons that his share in part of the fund should be applied for her benefit. With a view to this she released her power and applied to the court to have the son's share, together with her life interest therein, applied according to the agreement. Kay, J., refused to exercise his power to dispense with the restraint on anticipation, and this was sustained by the Court of Appeal.

The only passage which has been observed in the English reports as showing that the rule as to the release of special powers in gross can be supported on any other ground than that of authority is contained in some remarks of Chitty, J., in *In re* Somes,[32] where, after deciding that the authorities had held that such a release was valid, he goes on thus:

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[29] [1904] 2 Ch. 348, 352.
[30] 40 Ch. D. 418 (1889).
[31] 44 & 45 Vict. (1881) § 39.
[32] [1896] 1 Ch. 250, 255.

"If it be necessary to base my decision upon broader grounds, I may say that it appears to me that there is a fallacy in applying to a release of a power of this kind the doctrine applicable to the fraudulent exercise of such a power. There is no duty imposed on the donee of a limited power to make an appointment; there is no fiduciary relationship between him and the objects of the power beyond this, that if he does exercise the power of appointment, he must exercise it honestly for the benefit of an object or the objects of the power, and not corruptly for his own personal benefit; but I cannot see any ground for applying that doctrine to the case of a release of a power; the donee of the power may, or he may not, be acting in his own interest, but he is at liberty, in my opinion, to say that he will never make any appointment under the power, and to execute a release of it."

But what is the object in creating a power, especially an exclusive power, to appoint among children or issue, and making a gift in default of appointment, instead of making a gift, without any power of appointment? It is because the creator of the power deems it important that there should exist a power to make the shares unequal or to give to issue other than children, as the circumstances of the family from time to time may demand. This is the very purpose and *raison d'être* of the power, and though the power be not strictly a trust, this power of unequal appointment, or of appointment to issue instead of children, is something of which he did not intend that the donee of the power should divest himself. The matter is well put by Kay, J., in *In re* Little:[33]

"But just consider what this power really means. The power to distribute the fund among the children of the tenant for life is a power which contemplates that the circumstances of the family may so alter, that it may be of the highest possible importance to give a larger share to one child than to another. It is a power essentially, in that respect, in the nature of a trust. For instance, it is possible that one child may come into property which may make him independent, while the other children may have nothing to depend upon but this fund. Then it would be an obvious use of a power like this to give a larger share to the children who had no other means. Or, again, on the occasion of a marriage or of the advancement of a child, it might become essential to give an immediate share or a larger share to that child. All these are purposes which the donor of such a power as this must be considered to have had in his mind when he created the power."

[33] 40 Ch. D. 418, 422.

The true doctrine, therefore, as to special powers in gross, exercisable by either deed or will, it is submitted, is this:

If the person to whom an exclusive power is released is an object of the power the release is good, because it is in truth an appointment; but just as an appointment made to benefit the donee is a fraud on the power, so a release to an object of the power made to benefit the donee is a fraud on the power.[34]

If the person to whom the power is released is not an object of the power, as when a life tenant has a power to appoint to his children, but the gift in default of appointment is to B, and a release is made to B, then in a jurisdiction which is not bound by English statute or precedent, such release should be considered invalid.

To pass to powers in gross which can be executed only by will:

(B) *Can testamentary powers in gross be released?*

It is perfectly settled that a power to appoint by will cannot be exercised by deed, and that the exercise of a testamentary power by deed will not be aided in equity as a defective execution of the power.[35]

It would seem to be pretty clear on principle, that if a donee's power to appoint by will is to remain ambulatory, he cannot debar himself from changing his mind not to exercise it; but in 1822, Sir Thomas Plumer, M. R., held that a life tenant, with a general power to appoint by will, could release the power, in Barton *v.* Briscoe;[36] and in the next year he made the like decision where the power was special, in Horner *v.* Swann;[37] and the same decision was made in the case of *In re* Chambers;[38] and, under a general power, in Page *v.* Soper;[39] and in Davies *v.* Huguenin,[40] A, tenant for life, who had an exclusive special power to appoint by will to his children, with a gift over, in default of appointment, to the children, covenanted, on the marriage of his daughter, that he would not so exercise the power as to diminish her share. Wood,

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[34] Thomson's Executors *v.* Norris, 20 N. J. Eq. 489 (1869).

[35] Reid *v.* Shergold, 10 Ves. 370, 380; Sugden, Powers, 8 ed., 560; Farwell, Powers, 2 ed., 332.

[36] Jac. 603, 607.

[37] T. & R. 430.

[38] 11 Ir. Eq. 518 (1847).

[39] 11 Hare, 321 (1853).

[40] 2 Hem. & M. 730 (1863).

V. C., held, that the power was released *pro tanto*. He said: "It is almost too clear for argument (though the point was raised) that the covenant by the father operated *pro tanto* as a release of his power."

In Coffin *v.* Cooper,[41] A, having the life interest in a trust fund of personalty, had a power to appoint by will to her children, and there was a gift in default of appointment to the children. A covenanted to appoint a certain share to a son, and she appointed accordingly. It was contended that this was a fraud on the power as an attempt to exercise by deed a power which the creator of the power intended should be exercised by will only. Kindersley, V. C., felt himself bound by the authorities to hold that the appointment was good, but he thought the decision was against "certain broad principles." This was a case of an appointment, but that the learned Vice-Chancellor thought that the same principles applied to a release is shown by the words here printed in italics in his opinion, which is given in full in a note.[42]

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[41] 2 Dr. & Sm. 365 (1865).

[42] "Whatever opinion I might entertain with respect to this case, if it were not affected by authorities, I do not think I should be justified in the face of the authorities which have been cited, in coming to the conclusion that this appointment is invalid, and I must therefore look at the case having reference to those authorities.

" In this case power is given to Mrs. Comfort to appoint a fund among her children in such shares as she should by will appoint, and in default of appointment among those children equally on their attaining twenty-one, or marriage. Of course, if she appointed by will, she could only appoint among those who survived her, but if she did not appoint, then under the terms of the settlement not only those who survived her, but also those who died in her lifetime, having attained twenty-one or married, would participate. The power is to appoint by will only.

" In the absence of authority, I should have decided this case with reference to certain broad principles, the soundness of which cannot (I think) be disputed. One is, that a power to appoint among children is a power in the nature of a trust, created and intended to be exercised with a view to the benefit of the objects of the power, as a class, and as individuals.

" The donor abstained from himself fixing irrevocably the shares in which the children should take, and gave the donee power to appoint other than equal shares, because he considered that circumstances might thereafter arise to render it desirable and expedient that they should take different shares; as, for instance, one child might subsequently become very wealthy and another very poor; one child might become bankrupt or insolvent, so that anything given to him would not go to his benefit, but only to that of his creditors. The end and purpose of the power is the benefit of the children; and it appears to me to be a principle that the donee in the exercise of the power should have that object alone in view. Of course, I do not exclude the con-

In Thacker *v.* Key [43] there is an important *dictum* of James, V. C. Here there had been a covenant by the donee of a testamentary

sideration that the donor may also have intended to keep the children under the parents' control, where a parent is the donee of the power.

"Another general principle is this, that where a donor gives the power to appoint among children by will only, the power cannot be exercised by deed; and I should have thought that it would have followed as a corollary from that proposition that the donee of the power could have no right at his own will and pleasure to turn it into a power to appoint by deed. The donor intimating the power to be exercised by will only, does it designedly; his object being that, as the circumstances of the children respectively may from time to time change, and as he wishes the power to be exercised with a view to those altered circumstances, an irrevocable exercise of the power may be suspended as long as possible, till the time arrives when the fund is to come into the possession of the donees. And I think that anything which militates against that principle is contrary to the object and intention of the donor. If he had intended that the power was to be exercised by a deed *inter vivos* he might have given the power accordingly. By making it exercisable by will only, he has clearly signified his intention that it should only be exercised in that way.

"Another general principle appears to me to be that where a donee of a power is shewn to have exercised it with a view of benefiting some person not an object of the power, and *a fortiori* with a view of his own benefit, even in the absence of any actual bargain, the appointment cannot be supported, as being in violation of the principle that nothing shall be regarded but the benefit of the objects of the power.

"These appear to me to be sound general principles, and if I were not concluded by authority, I should have decided the case in accordance with them. But these principles have been broken in upon little by little, until they seem to have been in a great degree set aside.

"*First, it was decided that the donee of such a power may release it; in other words, may bind himself not to exercise the power at all, so that any subsequent exercise of the power will be void, whatever circumstances may arise, to make it desirable, with a view to the benefit of the children, that the power should be exercised. It is quite clear that a release of the power is in effect fixing the shares which the objects of the power are to take. It was next decided that the donee of a power to appoint by will among children may covenant that one of the children shall not have less than a certain amount. It seems to follow from this that the donee may covenant that the child shall have a certain share. The effect of these decisions is, to trench upon the principle that the discretion of a donee of a power to appoint among children by will, shall remain unfettered, and capable of being exercised as long as he lives. But not only has it been decided that an appointment made in pursuance of such a covenant is valid, but it has been held that such a covenant so entirely precludes any testamentary appointment inconsistent with it, that the covenantee may compel the other appointees to make it good out of the shares which the donee of the power has appointed to them by will, Davies* v. *Huguenin, 1 Hem. & M. 730. I do not presume to say that that is a wrong decision; indeed, it seems to me, that it is the legitimate result of the first innovation. But its effect is literally this, that the donee of a power to appoint among children by will only, can by deed fix the shares which the children shall take; in other words, he may convert a power to appoint by will only into a power to appoint by deed. I confess these decisions strike me as being a violation of general principles.* But

[43] L. R. 8 Eq. 408 (1869).

special power in gross to appoint a part of the fund to one of the objects of the power. The case was decided on another ground, but the learned Vice-Chancellor said:

"Now, if it had been necessary to determine that point, I think I should have had very little difficulty in holding such a covenant to be illegal and void. The testator is the donee of a testamentary power, which was to be exercised by him as a trustee. It was a fiduciary power in him to be exercised by his will, and by his will only; so that, up to

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I cannot, in the face of them, decide that the appointment in the present case is bad by reason of the covenant which had been entered into by Mrs. Comfort, there being no corrupt motive which induced her to enter into it. The object was, to benefit the son by giving security for goods to be supplied to him, and for this purpose the power of appointment over the trust fund was called in aid. There was no *mala fides* in the transaction, all was done fairly and openly; there was no intention that the mother should derive any benefit from the transaction; on the contrary, she was undertaking some sort of burden, by giving the covenant.

" There is another point for consideration. Mrs. Comfort had, by entering into the covenant, placed herself in a situation that it would be for her advantage, that is, for the benefit of her estate after her death, that she should exercise the power in accordance with the covenant, for, if she did not, her executors might be liable to an action for breach of the covenant, whereas, if she exercised it in pursuance of the covenant, she would thereby relieve her estate from liability under the covenant. And with that view she directs by her will that her son, in whose favor she makes the appointment, shall, as soon as possible after her decease, pay to Messrs. Clagett & Brachi, the same sums which by the two deeds of 1857 and 1859 she had covenanted to appoint to the son, which direction it is contended was in effect a condition annexed to the appointment, and a condition for her own benefit. And on that ground it is contended that the appointment is invalid.

" I should have been disposed to think, on abstract principle, that there was much weight in this objection. But I consider that the decisions to which I have referred are an answer to it. When once it is decided that the donee of such a power may enter into such a covenant, that goes a long way towards the conclusion that the validity of the appointment is not affected by the fact that the donee has thereby a direct personal interest in making the appointment; and the direction to the son to make the payment to Messrs. Clagett & Brachi, even if it be regarded as a condition annexed to the appointment, may be void without affecting the validity of the appointment. And further, there is the case of Stuart *v.* Lord Castlestuart, before the Master of the Rolls in Ireland, which bears distinctly upon this point. In that case, a parent having such a power as this, had become guarantee for a son, one of the objects of the power, and the appointment was made in order to enable the son to pay the debt, and it was held that that did not vitiate the appointment; that decision is referred to by Lord St. Leonards in his Treatise on Powers without disapprobation.

" For the reasons I have stated, and in the face of the decisions referred to, I cannot take upon myself to decide that this appointment is bad by reason either of the donee of the power having entered into the covenant, or of the interest which she had to induce her to exercise it as she has done. I must therefore hold the appointment to be good."

the last moment of his life, he was to have the power of dealing with the fund as he should think it his duty to deal with it, having regard to the then wants, position, merit, and necessities of his children." [44]

"If, then, Sir John Key was to have his power as a trustee up to the last moment of his life, and to exercise it only as part of a solemn act — his last will and testament; if he was to do that, I do not see how it can be considered right or proper that he should fetter that fiduciary discretion by a covenant executed by him in his lifetime. It is not, however, necessary that I should determine that point." [45]

In Isaac *v.* Hughes [46] it was again *held* that the donee of a testamentary general power could release it by deed.

In Palmer *v.* Locke,[47] A, who had a life interest in a trust fund of personalty, was given a special power to appoint by will only. A made a will by which he appointed £5000 out of the fund to his son J, and the rest to his other sons. Shortly after he executed a bond binding himself that J should receive either out of A's own property or out of the trust fund at least £5000. A died without revoking the will. Jessel, M. R., felt bound by the authorities, against his own opinion, to decide that the appointment was good. He said:

"I decide this case simply on authority; and the most singular part of it is that I concur so much in the reasoning of the decision in Coffin *v.* Cooper, which I am bound to follow, that it makes it, if I may say so, more obligatory on me to follow that authority, because that case, which was decided in the year 1865 by Vice-Chancellor Kindersley, lays down what appears to me the true principle which should govern Courts of Equity in cases of this kind so clearly and forcibly that I think I should only diminish instead of adding to the weight of that judgment by any observations of my own. But in that case, even in the then state of the authorities, the Vice-Chancellor thought he was compelled to decide against his own opinion of what the true principle was; and he actually decided that a covenant by a lady to make an appointment in favour of her son for the very purpose of enabling him to borrow money, although the appointment was to be testamentary, was a valid covenant which would render her estate liable in damages, and that if she made the appointment in pursuance of the covenant, so as to exonerate her estate from that liability to damages, the appointment was

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[44] At p. 414.
[45] At p. 415.
[46] L. R. 9 Eq. 191 (1870).
[47] 15 Ch. D. 294 (1880).

a valid appointment. Now there is no possible distinction worth considering between the present case and the case of Coffin *v.* Cooper."

The case went to the Court of Appeals. There James, L. J., said:

"I am of opinion that the decision of the Master of the Rolls must be affirmed. He found himself bound by the decisions of Vice-Chancellor Kindersley in Coffin *v.* Cooper, and Vice-Chancellor Kindersley was rightly bound by what he considered to be, and what I consider to be, the common course of decision, which really prevented this point from being successfully raised."

Brett, L. J., said:

"I should have thought it very dangerous, unless there were some principle very clearly outraged, to overrule the decision of Coffin *v.* Cooper, which was decided so long ago, and which has probably been acted on; but I confess that it seems to me that, according to principle, the case of Coffin *v.* Cooper was right. . . . I agree entirely with the view which was taken by Lord Justice James in Thacker *v.* Key, that such a covenant as is here in question, and as was in question in Coffin *v.* Cooper, is a wholly void covenant."

Cotton, L. J., said:

"I do not go so far as to give an opinion that the bond is absolutely bad. . . . In one sense it is clearly bad, namely, that it cannot be construed as an exercise of a power of appointment, nor is it one that a Court of Equity would specifically perform. . . . I must add one word more to explain why I hesitate to say that such a bond as this is entirely void. It has been held that under certain circumstances such a bond, or one very like it, can be held to be a release of the power. If it is bad, it must be bad *in toto*, and I am not satisfied that it can be good as a release of a power and yet bad altogether as a covenant."

This difficulty felt by Cotton, L. J., that a covenant cannot be good for the appointment under a power, and yet can be good as a release, is a very real one.

In the case of *In re* Lawley,[48] A, the donee of a general testamentary power over a fund, borrowed money, and as security

[48] [1902] 2 Ch. 673; S. C., [1902] 2 Ch. (C. A.) 799; *sub nom.* Beyfus *v.* Lawley, [1903] A. C. 411.

covenanted with the lender that the loan should be a first charge on the fund, and that he would not revoke the will. He made a will accordingly and died. It was *held*, by Joyce, J., that the fund was assets for the payment of A's debts, and that the lender was not entitled to priority over the general creditors of the estate. The learned judge said:

"If the applicants were to succeed in the present case, the result would practically be that a donee of a general power to appoint by will could always make an effectual appointment by an instrument *inter vivos*."

The decision was affirmed by the Court of Appeals and in the House of Lords.

In the case of *In re* Evered,[49] A had an exclusive testamentary power over a fund of which she had the income for life to appoint to her children or their issue; the gift in default of appointment was to the children equally. She appointed by will £60,000 to be held in trust, the income of one sixth part to be paid to each of her six sons for life, the principal of such part to go to his children, and the residue of the fund to be held on a like trust for her six sons and her daughter. Subsequently she covenanted with three of her sons that she would not exercise her power in such a way as to reduce their respective shares in the fund below £7000 apiece, to come to them immediately on her death. The fund turned out to be about £54,000.

The Court of Appeals *held* that under the Conveyancing Act[50] she could release her testamentary power; that the covenants with the three sons operated as a release of the power, so far that she was debarred from exercising the power so far as was necessary to give effect to the covenants; that as the sons took only life interests under the appointment, the only way to give effect to the covenants was to leave £49,000 unappointed; that, therefore, only £5000 passed under the appointment; and that to give the covenants any further effect would amount to allowing testamentary powers to be exercised by deed, which cannot be done.

The above case arose under a statute, and the facts are rather complicated, but let us see how the doctrine, apart from statute,

[49] [1910] 2 Ch. (C. A.) 147.

[50] 1881, c. 41, § 52.

as to release of a testamentary power would apply in a simple and very probable case, which may serve as a type.

A testator devises a fund of $30,000 in trust for his wife for life, with a testamentary power to appoint to or for the benefit of his children and grandchildren, on such terms and for such estates as she sees fit; the remainder in default of appointment is to the children. There are a son and two daughters. The widow makes a will by which she appoints one third of the fund to each of the children for life, with remainders to its issue. The son wishes to raise money on his share; the simplest way would be to appoint his share to the son by deed, but this it is conceded cannot be done, because the power must be exercised by will, and an appointment by will to him will not do, because the son cannot raise money on an ambulatory appointment which may be revoked. The widow therefore covenants that the son shall have on her death $10,000 out of the fund. The effect of this, on the English doctrine, is that the whole appointment fails, and the daughters have their shares outright, and yet the mother knows that the daughters, though excellent women, are, as is the case with so many excellent women, perfectly incompetent to care for money, and that it is sure to be wasted.

Or, again, a testator gives to his wife an exclusive power by will to appoint to children, and says that he makes the power exclusive, so that a child who turns out in her life to be undeserving may not share, and this, though not expressed, is often in his mind. Now the wife makes such a covenant as is suggested. The child on whose behalf the covenant is made becomes drunken, worthless, criminal, — the mother's hands are tied, although it was the purpose of the will that she should be free to do what she thought right during her whole life.

To sum up: In England, it has been settled that a covenant to exercise a testamentary power in gross cannot avail, even in equity, as an exercise of the power; but that, even apart from statute, a testamentary power in gross can be released by a covenant or other act *inter vivos*.

In most of this series of cases that we have been considering the testamentary power was special, but in some of them it was general.[51]

[51] Barton *v.* Briscoe, Jac. 603; Page *v.* Soper, 11 Hare, 321; Isaac *v.* Hughes, L. R. 9 Eq. 191; *In re* Lawley, [1902] 2 Ch. 673; [1902] 2 Ch. (C. A.) 799; *sub nom.* Beyfus *v.* Lawley, [1903] A. C. 411.

As the English cases hold on authority that a special testamentary power can be released, they must hold that a general testamentary power can also be released, but the criticisms that have been passed on the doctrine seem to apply to general equally with special powers. If the creator of a power intends that it shall be ambulatory, as he shows that he does by making it testamentary, it would seem to be immaterial whether the power is confined to particular objects or not. If the creator of the testamentary power declares that it shall be exercisable by will only, he intends that the donee shall be free to change his mind as circumstances shall require, so long as he lives.

It is submitted that Kindersley, V. C., and Jessel, M. R., are right in thinking that the decisions as to releases rest only upon authority, and are in violation of unquestionable broad doctrines of equity, and that the distinction between *exercising* a testamentary power by deed, and *releasing* such a power by deed, is, on principle, untenable.

The cases in the United States are not numerous:

Hume v. *Hord:* [52] A general power of appointment by deed or will can be released.

Brown v. *Renshaw:* [53] When the donee of a general testamentary power has the equitable fee, a conveyance of the land by him extinguishes the power.

McFall v. *Kirkpatrick:* [54] Here precisely the same question was decided as in Brown *v.* Renshaw, and in the same way.

Leggett v. *Doremus:* [55] A power is not extinguished by a judgment against the donee.

Reid v. *Gordon:* [56] If a life tenant has a power exercisable either by deed or will, such power is not extinguished as to the remaindermen by a conveyance by the donee which passes only her life estate.

Thomson's Executors v. *Norris:* [57] The New Jersey Court of Errors and Appeals determined that the release of a testamentary power given to A, a life tenant, to appoint to a class with a gift in default of appointment to certain members of the class, if made for

[52] 5 Grat. (Va.) 374 (1849).
[53] 57 Md. 67 (1881).
[54] 286 Ill. 281 (1908).
[55] 25 N. J. Eq. 122 (1874).
[56] 35 Md. 174 (1871).
[57] 20 N. J. Eq. 489 (1869).

the benefit of A, was void as a fraud on the power. Beasley, C. J., in delivering the opinion raises the question whether, "when an interest, for life or for years," is given to A, with direction to appoint by will or otherwise, between B and C, who are strangers to A, "such a power can be released." He says: "I shall pass the question without the expression of any opinion upon it." But it is evident that the learned Chief Justice's opinion inclined against the validity of the release.

Atkinson v. *Dowling:*[58] A, a life tenant, had an exclusive testamentary special power of appointment, with a gift, in default of appointment, to her three sons. *The sons conveyed their remainder to A*,[59] and she then conveyed the land. It was held that the power was extinguished. By the conveyance of the sons, A became tenant in fee, and the power became appendant.

All these decisions seem in accordance both with principle and precedent.

Thorington v. *Thorington:*[60] A, tenant for life, had a testamentary power to appoint to her three sons, B, C, and D, "on such shares and proportions to them, or the survivors, and under such safeguards, in trust or otherwise, as, under the circumstances then existing, she may deem just and wise"; the remainder in default of appointment was to the sons or their survivors. B died leaving children. A, C, and D, and the children of B, by their guardian, filed a bill in equity praying that the land might be sold. A guardian *ad litem* was appointed for the children of B, and the court ordered a sale.

The court having held that it had jurisdiction to decree the sale of infants' lands, proceeded to discuss whether a testamentary special power could be released, and, basing itself on Smith *v.* Death and Horner *v.* Swann, was of opinion that the release would be valid.

It should be observed that the only objects of the power were the remaindermen.

Grosvenor v. *Bowen:*[61] A, tenant for life, had a general testamentary power; there was a gift over in default of appointment. The Supreme Court of Rhode Island *held*, following Smith *v.* Death and Horner *v.* Swann, that the power was released or

[58] 33 S. C. 414 (1890).
[59] See pp. 415, 425.
[60] 82 Ala. 489 (1886).
[61] 15 R. I. 549 (1887).

extinguished, and that A and the remaindermen could pass a good title.

These three preceding cases suggest this query: If we assume that a testamentary power in gross cannot be released, why is it not always possible to evade this by the remaindermen conveying their interest to the life tenant; the power thus becoming a power appendant, the tenant can convey the land, and agree to hold the proceeds for the remaindermen, or settle it on himself for life with remainder to them. It is conceived that if the conveyance by the remaindermen to the life tenant is made *bonâ fide*, with the intention that the tenant for life shall become the real owner in fee, there is no reason why the power cannot be extinguished as appendant; but that if the conveyance is made to him only for the purpose of enabling him to extinguish the power (and the subsequent transactions would show whether this was the case), it is conceived that the acceptance of the conveyance by him might well be regarded as a fraud on the power.

Columbia Trust Co. v. *Christopher:*[62] Land was devised to trustees to pay the income to A for life, and on her death to B for life and on B's death to convey to certain charities. B had a power, not testamentary, to appoint to another charity to be established by her. The Court of Appeals of Kentucky *held*, following the English precedents, that B could release the power.

It should be observed that in Grosvenor *v.* Bowen the power was general, and that in Columbia Trust Co. *v.* Christopher it was not testamentary.

There are therefore only two states, Kentucky and Rhode Island, in which the English precedents have been followed (with perhaps the addition of Alabama), and it is submitted that the "broad principles of equity," to use the expression of Kindersley, V. C., require that the doctrine should not be adopted in other jurisdictions.

John Chipman Gray.

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[62] 133 Ky. 335 (1909).